ECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 8 - 2015
OFFICE OF THE CLERK

No. 142, Original

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF GEORGIA'S ANSWER

SAMUEL S. OLENS
ATTORNEY GENERAL
STATE OF GEORGIA
DEPARTMENT OF LAW
40 Capitol Square
Atlanta, GA 30334
Tel.: (404) 656-3383
AGOlens@law.ga.gov

CRAIG S. PRIMIS, P.C.
Counsel of Record
SARAH HAWKINS WARREN
K. WINN ALLEN
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel.: (202) 879-5000
craig.primis@kirkland.com

Special Assistant Attorneys General for the State of Georgia

January 8, 2015

ANSWER TO COMPLAINT FOR EQUITABLE APPORTIONMENT AND INJUNCTIVE RELIEF

The State of Georgia ("Georgia" or "Defendant"), for its Answer to the Complaint For Equitable Apportionment and Injunctive Relief ("Complaint") filed by the State of Florida ("Florida"), states:

1. This is an action by the State of Florida to equitably apportion the interstate waters of the Apalachicola-Chattahoochee-Flint River Basin ("ACF Basin").

Defendant admits this is an equitable apportionment action. Defendant denies that Florida is entitled to equitable apportionment of the ACF Basin.

FACTUAL BACKGROUND

2. The Chattahoochee River arises in northern Georgia and flows 430 miles to its confluence with the Flint River at the Georgia-Florida state line. The southern half of the Chattahoochee River forms the border between Georgia and Alabama. The Flint River also arises in the State of Georgia, before converging with the Chattahoochee River to form Florida's Apalachicola River (the "River"). The River flows into the Gulf of Mexico at the Apalachicola Bay (the "Bay"). Collectively, these three rivers and their surrounds comprise the ACF Basin. A map of the ACF Basin is provided at App. 1.

Defendant admits the allegations in paragraph 2, except that it denies that the Flint River converges with the Chattahoochee

River to form the Apalachicola River. Defendant further states that the Chattahoochee River and Flint River flow into Lake Seminole and that the U.S. Army Corp of Engineers (the "Corps") releases water from the Woodruff Dam into the Apalachicola River. Defendant further notes that while a portion of the Chattahoochee River forms the border between Georgia and Alabama, the river itself is in Georgia. Defendant admits that Plaintiff attached a map at App. 1 but lacks information sufficient to form a belief about the truth of the contents of the map. Except as specifically admitted herein, Defendant denies the allegations in paragraph 2.

3. The waters of the Chattahoochee and Flint River Basins provide essential inflows to the Apalachicola River and Bay (collectively, the "Apalachicola Region" or the "Region"). The flow of the Apalachicola River at the Georgia-Florida border, and the resulting inflows to the River and Bay, are created by the combined inflows of the Chattahoochee and Flint Rivers, their tributaries and hydrologically connected groundwater. These waters have nourished a rare and exemplary ecosystem that state, national, and international bodies have recognized for the diversity of its plant and animal species.

Defendant denies the first two sentences in paragraph 3, and states that the Chattahoochee and Flint Rivers flow into Lake Seminole. Defendant further states that the Corps releases water from the Woodruff Dam into the Apalachicola River. Defendant lacks

information sufficient to form a belief about the truth of the remaining allegations in paragraph 3 and therefore denies them.

4. The Apalachicola Region is also a unique and vibrant cultural, social and economic community, dependent primarily on the environmental health of the River and Bay. The ecosystem fuels a resource based economy that depends on the harvest of commercially salable species, most notably the Eastern Oyster. Generations of inhabitants have been defined by their existence in this economy and have lived, worked and prospered in a culturally rich community.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 4 and therefore denies them.

5. At present, the Apalachicola Region's ecosystem and economy are suffering serious harm because of Georgia's increasing storage and consumption of water from both the Chattahoochee and Flint River Basins. Large, and ever-increasing, amounts of water (taken both as surface water and the hydrologically connected groundwater) are withdrawn, impounded and consumed upstream for municipal, industrial, recreational, and agricultural uses permitted by Georgia. These uses are forcing Floridians to shoulder the heavy burden of Georgia's growth.

Defendant admits that Georgians draw water from the Chattahoochee and Flint River Basins for municipal, industrial, and agricultural uses, among others. Defendant

denies the remaining allegations in paragraph 5.

6. Florida fisheries have suffered declines as a result of Georgia's upstream storage and consumption of water from the Chattahoochee and Flint River Basins. Flow depletions from the Georgia portion of the ACF Basin have already shrunk available riverine and estuarine habitats in the Apalachicola Region and precipitated a collapse of Florida's oyster fishery. The federal government recently recognized the collapse and issued a fishery disaster declaration for the oyster industry in Florida.

Defendant denies the allegations in paragraph 6, except that it admits, on information and belief, that Florida Governor Rick Scott sought a declaration of a commercial fisheries failure for the oyster industry from the U.S. Department of Commerce, which was granted. Except as specifically admitted herein, Defendant denies the allegations in paragraph 6.

7. Georgia officials have projected that Georgia's consumption of ACF Basin water will nearly double from present levels by 2040. See Affidavit of Judson H. Turner, Director of the Georgia Environmental Protection Division, provided at App. 3-27. If Georgia's consumption increases as planned, the sole source of fresh water sustaining the Apalachicola River and Bay will shrink further, jeopardizing the viability of the Apalachicola Region's ecology, economy, and way of life.

Defendant denies the allegations in paragraph 7.

8. Before reaching Florida, the waters of the Chattahoochee River are temporarily stored in reservoirs owned and operated by the U.S. Army Corps of Engineers (the "Corps"). From 1990 through 2012, the Corps' operation of these reservoirs, and in particular operation of Buford Dam, which creates Lake Sidney Lanier in Georgia, was the focus of intense, multi-state and multi-jurisdictional litigation culminating in two decisions of the Circuit Courts of Appeals. *Se Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008); *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011). That litigation, directed solely at federal agencies, focused on the Corps' obligations under various federal statutes, including the Endangered Species Act ("ESA"), the Flood Control Act of 1944, the National Environmental Policy Act, the Rivers and Harbors Act of 1899, and the Water Supply Act of 1958. The lower court litigation did not, and could not, address the fundamental problem facing Florida - Georgia's ever-increasing storage and use of water that has historically nourished the Apalachicola Region.

Defendant admits that the waters of the Chattahoochee River flow through, and that some of the waters are temporarily stored in, reservoirs owned and operated by the Corps. Defendant admits that the Corps' operation of these reservoirs was the subject of multi-state and multi-district litigation directed at federal agencies between 1990 and 2012, which involved multiple federal statutes. Except as

specifically admitted herein, the allegations in paragraph 8 are denied.

9. A significant, yet ultimately unsuccessful, effort was made to resolve that problem. Beginning in the late 1990s, and into the early 2000s, Florida attempted to resolve its concerns through negotiation. In early 1992, Florida, Georgia, and Alabama (collectively, the "States") commenced a process to study the needs of the ACF Basin ("Comprehensive Study"). The Comprehensive Study arose from the States' efforts to settle litigation the State of Alabama initiated against the Corps. The States memorialized their intent in a Memorandum of Agreement dated January 3, 1992, which was approved by the U.S. District Court for the Northern District of Alabama.

Defendant admits that a Comprehensive Study was commenced in 1992. Defendant further admits that Florida, Georgia, and Alabama entered into a Memorandum of Agreement dated January 3, 1992. Except as specifically admitted herein, the allegations and characterizations in paragraph 9 are denied.

10. In 1997, following the completion of the Comprehensive Study, Congress passed the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) ("ACF Compact"), which was subsequently ratified by all three States. The parties to the ACF Compact agreed to develop an allocation formula for equitably apportioning the waters of the ACF Basin among the States while "protecting the water quality, ecology, and biodiversity" of the Apalachicola Region. ACF

Compact Art. VII(a). The ACF Compact recognized that, although upstream uses could continue to develop during the pendency of those negotiations, those uses would not become "permanent, vested or perpetual rights to the amounts of water used between January 3, 1992 and the date on which the [ACF Compact] Commission adopts an allocation formula." ACF Compact Art. VII(c). While the States could have resolved their differences through this ACF Compact process, Georgia's bad faith caused the negotiations to disintegrate, resulting in the demise of the ACF Compact in 2003.

Defendant denies the allegation that it acted in bad faith. Defendant further states that to the extent the allegations in paragraph 10 purport to characterize the ACF Compact, the document speaks for itself and no response is required. To the extent any response is required, defendant admits that Congress passed the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105104, 111 Stat. 2219 (1997) ("ACF Compact"), and that Florida, Georgia, and Alabama ratified the ACF Compact. Defendant denies all other allegations in paragraph 10.

11. Georgia took advantage of the time between initiation of the Comprehensive Study in 1992 and failure of the ACF Compact in 2003 to continually increase its consumptive uses. Since 1992, Georgia's municipal, industrial, recreational, and agricultural uses of ACF Basin water have grown significantly, but under the terms of the Memorandum of Agreement and the ACF Compact, Georgia had no entitlement to any of these inflated

uses. The pattern did not end after the ACF Compact failed, but has continued unabated, despite another decade of lower court litigation and failed judicial and non-judicial settlement efforts. Indeed, Florida has made numerous attempts to resolve this interstate dispute through formal and informal discussions, as well as court-sponsored mediation (including sessions facilitated by the U.S. Secretary of the Interior and the Council on Environmental Quality). *See, e.g.*, Joint Motion for Order Regarding Confidentiality of Settlement Negotiations, *In re Tri-State Water Rights Litig.*, (No. 315). All of these efforts ultimately failed.

Defendant admits that Florida and Georgia have attempted previously to resolve this dispute through formal and informal discussions, including through mediation, but denies all other allegations in paragraph 11.

12. Florida has exhausted all other reasonable means to arrest Georgia's unchecked use of water and halt the continuing degradation of the Apalachicola Region. Florida now, of necessity, invokes the Court's original jurisdiction seeking an appropriate apportionment to redress existing harm and to avert additional harmful depletions caused by uses in Georgia. There is no other forum in which Florida may vindicate its interests and obtain the requisite relief against Georgia.

Defendant admits that Florida has invoked th Court's original jurisdiction. Defendant denies all other allegations in paragraph 12.

13. Florida's action for an equitable apportionment includes all waters hydrologically connected to the Chattahoochee and Flint Rivers (including, without limitation, groundwater, rivers, streams, creeks, draws, and drainages).

To the extent the allegations in paragraph 13 purport to characterize the Complaint, the document speaks for itself and no response is required. To the extent a response is required, the allegations in paragraph 13 are denied.

14. Alabama lies upstream of Florida within the ACF Basin. Although not opposed to Alabama's participation in this action, Florida asserts no wrongful act by Alabama and seeks no affirmative relief against Alabama. Therefore, Alabama is not named in this action. *Compare Nebraska v. Wyoming*, 295 U.S. 40 (1935).

Defendant admits that a portion of the geography of the State of Alabama lies upstream of Florida within the ACF Basin, and further states that Alabama withdraws and consumes water from the ACF Basin for municipal, agricultural, recreational, and industrial purposes. Defendant further admits that Florida did not name Alabama in its Complaint. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 14 and therefore denies them.

15. Florida also seeks no affirmative relief against the United States in this action with respect

to the Corps' operation of the federally authorized dam and reservoir system, or any other interest.

Defendant admits that Florida did not name the United States in its Complaint. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 15 and therefore denies them.

JURISDICTION

16. The Court has jurisdiction pursuant to Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a) (2011).

Defendant admits that Plaintiff seeks to invoke the original jurisdiction of this Court but denies that this matter is appropriate for resolution as an original action.

EQUITABLE APPORTIONMENT

The Apalachicola-Chattahoochee-Flint River Basin

17. The Chattahoochee River begins in the Blue Ridge Mountains in northeastern Georgia and flows through metropolitan Atlanta and to the southwest until it turns south and forms the border of Georgia and Alabama. The Chattahoochee River and its tributaries provide municipal and industrial water to a majority of the Atlanta metropolitan population including Fulton, DeKalb, Gwinnett, Forsyth, Douglas and Cobb counties, as well as the city of Columbus. Most surface water intakes are located on the Chattahoochee River, its smaller tributaries, and Lake Lanier.

Defendant admits the Chattahoochee River begins in the Blue Ridge Mountains in northeastern Georgia, flows through metropolitan Atlanta, and forms a portion of the border between Georgia and Alabama. Defendant further states that no part of the Chattahoochee River lies in Alabama. Defendant further admits the Chattahoochee River and its tributaries provide municipal and industrial water to Atlanta's metropolitan population and to the city of Columbus. Defendant admits that surface water intakes are located on the Chattahoochee River, its tributaries, and on Lake Lanier. Except as specifically admitted herein, the allegations in paragraph 17 are denied.

18. The Flint River rises in the metropolitan Atlanta area and flows generally southward through Albany and on to the Georgia-Florida border. The Flint River Basin is the source of water for hundreds of thousands of acres of irrigated land in southern Georgia, most of which is served by irrigation wells.

Defendant admits that the Flint River rises in the metropolitan Atlanta area and flows generally southward through Albany and toward the Georgia-Florida border. Defendant further states that the Flint River flows into Lake Seminole and that the Corps releases water from the Woodruff Dam into the Apalachicola River. Defendant further admits that water in the Flint River Basin is used to irrigate land in southern Georgia, including through irrigation wells. Except as specifically

admitted herein, the allegations in paragraph 18 are denied.

19. The southern half of the Flint River and some of its tributaries are hydrologically connected to the underlying Floridan Aquifer. In this region, groundwater discharge through the streambed, stream banks, and springs from the Floridan Aquifer contribute to the total flows of the river during years of normal precipitation. That percentage increases in years with below-normal precipitation.

Defendant admits that some of the Flint River and some of its tributaries are hydrologically connected to the Floridan Aquifer. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 19 and therefore denies them.

20. At the Georgia-Florida border, the Flint River joins with the Chattahoochee River at the Jim Woodruff Lock and Dam ("Woodruff Dam") to form Lake Seminole. At Lake Seminole, the unified Chattahoochee and Flint Rivers become the Apalachicola River. The Apalachicola River lies entirely within the State of Florida and flows, unimpeded by any dam, southward across Florida's panhandle and feeds into the Apalachicola Bay at the Gulf of Mexico.

Defendant admits the allegations in the first and third sentences of paragraph 20. Defendant denies the second sentence of paragraph 20 and states that the Corps releases water from the Woodruff Dam into the Apalachicola River. Except as specifically

admitted herein, the allegations in paragraph 20 are denied.

21. Water withdrawals from the Chattahoochee and Flint River Basins, either directly from the Chattahoochee and Flint Rivers and their tributaries or indirectly from hydrologically connected ground-water, reduce the amount of water flowing to the Apalachicola River at all times, but the effects are especially apparent during the low flow summer and fall periods. Therefore, water use in Georgia has a direct hydrologic impact on Florida.

Defendant denies the allegations in paragraph 21.

22. The Corps operates five dams on the Chattahoochee River (in downstream order): Buford, West Point, Walter F. George, George W. Andrews and Woodruff. Woodruff also impounds water from the Flint River and marks the upstream end of the Apalachicola River. Although independent facilities, the Corps' dams are operated as a unified whole to achieve multiple project purposes.

Defendant admits the first two sentences in paragraph 22. Defendant lacks information sufficient to form a belief about the truth of the allegations in the third sentence of paragraph 22 and therefore denies them.

23. Water storage and consumption in Georgia also affects how water is released to Florida from these federal reservoirs. The Corps determines how much water to release from its reservoirs based, in part, upon calculated inflows to the ACF Basin. Georgia's storage and consumption reduces those inflows. As a result, as Georgia's uses increase, the

calculated inflows to the ACF Basin decline, and even less water is released from the Corps' reservoirs. The net result of Georgia's unmitigated water use is that less water reaches Florida due to both the hydrologic depletions and the Corps' operational protocols.

Defendant admits that the Corps determines how much water to release from its reservoirs. Defendant further admits that the Corps' operational protocols affect water flow. Except as specifically admitted herein, the allegations in paragraph 23 are denied.

The Unique and Rich Ecology of the Apalachicola Region

24. Maintaining an ample flow of water from the Chattahoochee and Flint River Basins is critical to preserving the ecology of the Apalachicola Region. Georgia's current storage and consumption has already injured this precious resource.

Defendant denies the allegations in paragraph 24.

25. The rich biodiversity of the Apalachicola Region in Florida is reflected in the presence of 142 freshwater and estuarine fish species (99 species in nontidal reaches and 43 species in tidal reaches of the River), 26 species of mussels (including 3 federally listed mussels and 4 candidate species proposed for federal listing), and over 1,600 species of plants (including 342 species in wetland forests of the River floodplain).

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 25 and therefore denies them.

26. The Apalachicola River has the largest river floodplain forest in Florida and the greatest number of freshwater fish species in Florida. The Apalachicola Basin has the greatest herpetofaunal species richness in North America north of Mexico and is one of the most important areas in the United States for reptiles and amphibians (particularly anurans, salamanders, snakes, and turtles). Also, Ogeechee tupelo trees in the floodplain forest of the Apalachicola River are the principal source of commercially produced tupelo honey in the United States.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 26 and therefore denies them.

27. The Apalachicola Bay has been historically one of the most productive estuarine systems on the Gulf Coast. It is home to the congressionally created Apalachicola National Estuarine Research Reserve ("ANERR"), which encompasses 246,766 acres of land and water, making it the second largest of the 28 national estuarine research reserves. ANERR includes two barrier islands and part of a third, which includes the lower 20 miles of the Apalachicola River and its floodplain, adjoining uplands, and the Apalachicola Bay. ANERR received international recognition when it was designated as a Biosphere Reserve by the United Nations Educational, Scientific, and Cultural Organization.

Defendant admits, on information and belief, that Congress created the Apalachicola National Estuarine Research Reserve ("ANERR"). Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 27, and therefore denies them.

28. The rich and complex ecosystem of the Apalachicola Region developed under the Chattahoochee and Flint Rivers' unimpaired, natural flow regime. This natural flow regime was responsible for the creation of river channel habitat, cyclical inundations of the floodplain, inter-connections of floodplain channels, maintenance of a suitable salinity regime in the Bay, and inputs of essential nutrients to the Bay.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 28 and therefore denies them.

29. The Apalachicola Region provides habitat for more than 100 species that the federal government and the State of Florida have designated as endangered, threatened, or species of concern. These species, and their federally protected habitats, depend upon the historical flow patterns of the Apalachicola River for their continued existence. Threatened and endangered species also reside in the waters within the Georgia portion of the ACF Basin.

Defendant admits the last sentence in paragraph 29, and further admits that the federal government has designated protected species in the Georgia and Florida portions of

the ACF Basin. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 29 and therefore denies them.

The Social and Economic Significance of the Apalachicola River and Bay

30. The environmental health of the Apalachicola Region directly affects the local economy and sociology. The local population of Franklin County and the surrounding region is highly dependent on the region's natural resources, which support both the regional economy and a unique way of life that has evolved around the seafood and coastal industries.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 30 and therefore denies them.

31. Freshwater inflows provide essential nutrients to the Bay that make it one of the most productive areas for fish and shellfish in the entire Gulf of Mexico. Freshwater inflows also reduce the Bay's salinity, which is essential to oysters and other commercially salable species, by limiting predation by marine species and disease.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 31 and therefore denies them.

32. Commercially salable species in the Bay include the Eastern Oyster, shrimp, blue crab, and several varieties of finfish. Until recently, the Bay produced about 12 percent of the nation's Eastern Oysters. Much of the oyster, shrimp and fish harvest

is exported for consumption throughout the United States.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 32 and therefore denies them.

33. The species that inhabit the Apalachicola Region provide a wide range of economic benefits to the Region and to Florida. Similarly, the Apalachicola Region supports significant tourism and recreation-based industries. Tourists and outdoor enthusiasts engage in recreation in, on, and around the River and Bay. Outdoor recreation in the Apalachicola Region includes a wide spectrum of activities, including kayaking, canoeing, mountain biking, horseback riding, hunting, fishing, ATV, and motorbike riding, backpacking, birding, and botanical study.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 33 and therefore denies them.

34. The resources within the Apalachicola Region also provide substantial economic benefits in the form of ecosystem services, *e.g.*, water filtration, waste assimilation, flood attenuation, and flood mitigation. All of these benefits accrue as a direct result of the ecosystem that is created from the flows of the Apalachicola River.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 34 and therefore denies them.

35. The region's economic and sociological interests cannot be replaced with other industries or mitigated through relocation. Indeed, if the seafood

industry disappears in Apalachicola, one of the most storied working waterfronts in the State will be lost to history.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 35 and therefore denies them.

Efforts to Protect the Apalachicola River and Bay

36. Because of its value and importance to its citizenry, Florida has made a substantial commitment of public resources to protect the Apalachicola Region. The altered flow regime caused by Georgia has had, and continues to have, an adverse impact on Florida's preservation efforts, undermining Florida's extraordinary investments.

Defendant lacks information sufficient to form a belief about the truth of the allegations contained in the first sentence in paragraph 36 and therefore denies them. Defendant denies the second sentence of paragraph 36.

37. Florida has designated areas within the ANERR as Outstanding Florida Waters, and Apalachicola Bay as an Aquatic Preserve. Both designations provide heightened legal protections beyond those afforded other waters of the State.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 37 and therefore denies them.

38. In addition, Florida has funded many of the natural resource management programs for the Apalachicola River and Bay. These protective efforts include the purchase of more than 329,000 acres within the Apalachicola Region. Of that total,

approximately one-third was purchased since January 1999, at a cost exceeding $120 million.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 38 and therefore denies them.

39. Florida continues to show a high level of commitment to Apalachicola preservation. This year's State budget included nearly $5 million for water quality restoration projects in the Apalachicola Bay estuary and for oyster shelling and research to help industry recovery.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 39 and therefore denies them.

40. In 2006, the Northwest Florida Water Management District, the State body responsible for water management in the Apalachicola River Basin, adopted rules that effectively preclude any further consumptive withdrawals of surface water from the Apalachicola River, the Chipola River, and the Chipola Cutoff. This extraordinary measure was undertaken expressly to protect the ecosystem of the Apalachicola Region.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 40 and therefore denies them.

41. Total land area within the Apalachicola River Basin acquired for conservation purposes by local, State, federal, and private actors exceeds an area 12 times larger than the District of Columbia.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 41 and therefore denies them.

The State of Georgia's Increasing Consumption of Water and its Adverse Impact on the Apalachicola River Basin and Bay

42. Georgia's water storage and consumption upstream of the Apalachicola River in the Chattahoochee and Flint River Basins has reduced Apalachicola River flows entering Florida. This reduction has damaged numerous species and habitats in the Apalachicola Region's ecosystem, and the overall economic, environmental, and social health and viability of the region.

Defendant denies the allegations in paragraph 42, as well as the section header that precedes it.

43. Georgia's storage and consumption causes significant economic injury to Florida. The River and Bay ecosystems provide important services to Florida's economy, and when these ecosystems are disrupted, these valuable services are placed at risk. The recent collapse of the oyster fishery in Apalachicola Bay is one example of the connection between the River and Bay ecosystems and the economy of the State.

Defendant denies the first sentence in paragraph 43. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 43 and therefore denies them.

44. Long-term climatic data has not shown significant changes in precipitation. However, the amount of discharge to the rivers and streams of the ACF Basin generated by precipitation events has diminished over time. Changing climatic conditions cannot, therefore, explain reductions in inflows to the Apalachicola River.

Defendant denies the allegations in paragraph 44.

45. The primary uses of water in the Chattahoochee River Basin are municipal and industrial. The metro-Atlanta region presently withdraws and uses 360 million gallons per day ("mgd") in the upper Chattahoochee River. App. 6. Georgia expects its demands to nearly double from present levels and by 2040, expects to withdraw 705 mgd. App. 7.

Defendant admits that water in the Chattahoochee River Basin is used for municipal and industrial purposes, among other purposes. The remaining allegations purport to paraphrase a written document, which speaks for itself. To the extent the allegations in paragraph 45 mischaracterize the written document or are no longer based on current data, Defendant denies them. Except as specifically admitted herein, the allegations in paragraph 45 are denied.

46. The primary uses of water in the Flint River Basin are agricultural. Georgia has authorized agricultural users to withdraw and consume water from the Flint River Basin for irrigation purposes. These users irrigate approximately 563,000 acres

(879 square miles). Annual withdrawals vary considerably depending on the summertime precipitation patterns but withdrawals typically increase during drought periods. In addition to this existing irrigation, Georgia has granted applications to irrigate additional acreage in the Flint River Basin. These granted applications, when combined with existing irrigation, total 843,000 acres (1,317 square miles), and an area larger than the State of Rhode Island. Georgia also has numerous additional applications pending approval. A map prepared by the State of Georgia illustrating the location and density of agricultural wells in the Chattahoochee River and Flint River Basins is provided at App. 2.

Defendant admits that Plaintiff attached a map at App. 2 but lacks information sufficient to authenticate the map. Defendant further admits that water from the Flint River Basin is used for agricultural irrigation, among other purposes. The remaining allegations appear to characterize written documents, which speak for themselves. To the extent the allegations in paragraph 46 mischaracterize the written documents or are no longer based on current data, Defendant denies them. Except as specifically admitted herein, the allegations in paragraph 46 are denied.

47. In the Flint River Basin, agricultural irrigation represents the largest volume of water use. Of the total number of irrigated acres (563,000), approximately 160,000 acres are irrigated by diverting water directly from streams throughout the Basin. The irrigation corresponds with the hottest and driest times of the year when evapotranspiration

through crops is highest. Irrigation diversions from surface and groundwater sources cause streams and ground-water levels, which are naturally approaching their seasonally lowest levels, to decline even further.

Defendant denies that Georgia's water use caused Florida's alleged injuries. Defendant admits that water from the Flint River Basin is used for agricultural irrigation, among other purposes. The remaining allegations appear to characterize a written document, which speaks for itself. To the extent the allegations in paragraph 47 mischaracterize the written document or are no longer based on current data, Defendant denies them. Except as specifically admitted herein, the allegations in paragraph 47 are denied.

48. Approximately 120 mgd are withdrawn from the Flint River Basin for municipal and industrial use.

Defendant denies the allegations in paragraph 48.

49. Over 20,000 non-federal water impoundments of various sizes have been constructed in the ACF Basin in Georgia. These impoundments intercept flow which would otherwise discharge to the ACF river system. The cumulative impact of these impoundments is significant, particularly during dry periods. The beneficial effects to the Apalachicola River from rainfall events during dry periods are either attenuated or completely eliminated when the impoundments

intercept flow. Much of this impounded water never arrives downstream because of increased evaporative losses and agricultural withdrawals. These impoundments continue to be constructed in the Georgia portion of the ACF Basin.

Defendant admits that non-federal water impoundments exist in the Georgia portion of the ACF Basin. Defendant denies the remaining allegations in paragraph 49, except that it admits, on information and belief, the last sentence in paragraph 49. Except as specifically admitted herein, the allegations in paragraph 49 are denied.

50. The existing storage, evaporation, and consumption of water by Georgia's municipal, industrial, recreational, and agricultural users have diminished the amount of water entering Florida in spring and summer of drought years by as much as 3,000-4,000 cubic feet per second ("cfs"). This has altered the flow regime of the Apalachicola River during the most vulnerable times for riverine and estuarine species. In recent drought years, Apalachicola River flows averaged less than 5,500 cfs throughout the entire late-spring-summer-fall period from May through December. Such long durations of extremely low flows were unprecedented before 2000.

Defendant denies the first and second sentences of paragraph 50. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 50, and therefore denies them.

51. As recognized by federal and state agencies, including the U.S. Geological Survey, well

pumping in Georgia's Flint River Basin directly affects the amount of water flowing in the Flint River and, thus, into Florida's Apalachicola Basin. *Stream-Aquifer Relations and the Potentiometric Surface of the Upper Floridan Aquifer in the Lower Apalachicola-Chattahoochee-Flint River Basin in part of Georgia, Florida, and Alabama* (USGS 2002).

Defendant denies that Georgia's water use caused Florida's alleged injuries. To the extent the allegations in paragraph 51 purport to characterize a publicly available document, the document speaks for itself. To the extent a response is required, Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 51 and therefore denies them.

52. As recognized by the U.S. Geological Survey, water level declines have caused substantial changes in the floodplain habitats throughout the Apalachicola River. *Water-Level Decline in the Apalachicola River, Florida, from 1954 to 2002, and Effects on Floodplain Habitats* (USGS 2006).

To the extent the allegations in paragraph 52 purport to characterize a publicly available document, the document speaks for itself. To the extent a response is required, Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 52 and therefore denies them.

53. As recognized by the U.S. Fish and Wildlife Service, upstream consumption is affecting threatened and endangered species and habitats

along the Apalachicola River. *See Biological Opinion on the U.S. Army Corps of Engineers, Mobile District, Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River* (USFWS 2012).

To the extent the allegations in paragraph 53 purport to characterize a publicly available document, the document speaks for itself. To the extent a response is required, Defendant denies the allegations in paragraph 53 to the extent they mischaracterize the U.S. Fish and Wildlife Service's Biological Opinion.

54. As a result of actions authorized by Georgia, Florida has already suffered harm of a serious magnitude to the Apalachicola Region's ecosystem and equities that arise from that ecosystem. Reduced freshwater inflows to the Apalachicola Bay over the past several years precipitated a collapse of the Apalachicola Bay oyster fishery, resulting in significant economic hardship to oystermen and others dependent upon oyster harvests.

Defendant denies the allegations in paragraph 54.

55. In 2012, Florida experienced the lowest average annual flow of the Apalachicola River in the 90-year period of record at the U.S. Geological Survey stream gage at Chattahoochee, Florida (immediately below Woodruff Dam). The average annual flow in 2012 was 65 percent lower than the average annual flow for 1923-2012. This record low flow year followed the fourth-lowest flow on record in

2011, resulting in an exceptionally low two-year period that was extremely harmful to species and habitats throughout the Apalachicola Region.

Defendant lacks information sufficient to form a belief about the truth of the allegations in paragraph 55 and therefore denies them.

56. The resulting low flows reduced available habitats in the Apalachicola River and thrust salinity levels in Apalachicola Bay above tolerable levels. Apalachicola Bay winter season oyster landings for 2012-2013 were 62.3 percent lower than the previous five year average and were the lowest ever recorded in Apalachicola Bay by the Florida Marine Fisheries Information System. Diminished harvest continues into the 2013-2014 winter season. As a result, the surrounding economy experienced a severe contraction and led Florida Governor Rick Scott to seek a declaration of a commercial fisheries failure for the oyster industry from the U.S. Department of Commerce, which was granted in August 2013.

Defendant admits, on information and belief, that Florida Governor Rick Scott sought a declaration of a commercial fisheries failure for the oyster industry from the U.S. Department of Commerce, which was granted. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 56 and therefore denies them.

57. Georgia's continued and increasing use of water will further harm Floridians who rely upon the Apalachicola Bay. If inflows from the

Apalachicola River continue to be reduced, the productivity of the Bay will be irreparably harmed.

Defendant denies the first sentence in paragraph 57. Defendant lacks information sufficient to form a belief about the truth of the second sentence in paragraph 57 and therefore denies it.

58. Adverse impacts are equally acute on the Apalachicola River. Since 2006, thousands of threatened and endangered mussels have died as a result of low summer flows, the threatened Gulf sturgeon's spawning habitat has been rendered inaccessible, and habitat for freshwater fish spawning and recruitment, along with floodplain habitats, have been adversely affected.

Defendant denies that Georgia's water use caused Florida's alleged injuries. Defendant lacks information sufficient to form a belief about the truth of the remaining allegations in paragraph 58 and therefore denies them.

59. As Georgia's water uses grow, the amount of water entering Florida will continue to decrease, essential fish and wildlife habitats will constrict, and Florida will suffer additional irreparable harm. As Georgia's upstream storage and consumption grows over time, low flow events will become more frequent and increase in severity, diminishing the likelihood that key species will survive and precluding any chance of recovery over the long term.

Defendant denies the allegations in paragraph 59.

60. The situation is dire and the need for relief immediate. Florida has a right to its equitable share of the waters that have flowed historically to it from the Chattahoochee and Flint Rivers. Florida cannot and should not suffer injury in order to satiate Georgia's unrelenting thirst.

Defendant denies the allegations in paragraph 60.

PRAYER FOR RELIEF

Florida prays that the Court require Georgia to answer Florida's complaint, appoint a special master, and after due proceedings, enter a decree equitably apportioning the waters of the ACF Basin.

Florida further prays that the Court enter an order enjoining Georgia, its privies, assigns, lessees, and other persons claiming under it, from interfering with Florida's rights, and capping Georgia's overall depletive water uses at the level then existing on January 3, 1992.

Florida also prays that the Court award Florida any other relief that the Court may deem just and appropriate.

Defendant admits that a Special Master has been appointed in this case. Defendant denies that Florida has alleged facts showing that it is entitled to an equitable apportionment of the waters of the ACF Basin. Except as specifically admitted herein, the allegations in Florida's Prayer For Relief are denied.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Florida's claims are barred by the doctrine of estoppel. Outside of this case, Florida has taken positions that are inconsistent with the allegations in its Complaint. Those inconsistencies include the following: In a letter to the United States Department of Commerce requesting a declaration of a commercial fishery failure for the oyster fishery in the Apalachicola Bay, Florida Governor Rick Scott identified only "drought conditions for several years" and "overharvesting of illegal and sub-legal oysters" as "factors [that] ... led to the recent decline in oyster populations." Letter from Gov. Rick Scott to Ms. Rebecca Blank, Acting Secretary, U.S. Department of Commerce, at 2 (Sept. 6, 2012). Governor Scott did not claim that Georgia's alleged inequitable water use was a cause of the decline in oyster populations in the Apalachicola Bay.

In its Complaint, however, Florida now alleges that Georgia's alleged inequitable water use is the cause of the decline in oyster populations in the Apalachicola Bay. Those allegations are inconsistent with Governor Scott's representation to the Department of Commerce that the collapse was caused by drought conditions and illegal overharvesting. Florida should therefore be estopped from arguing that Georgia's allegedly inequitable water use caused a decline in oyster populations in the Apalachicola Bay.

SECOND DEFENSE

Florida's claims are barred by the doctrine of waiver. As noted above, in a letter to the United

States Department of Commerce requesting a declaration of a commercial fishery failure for the oyster fishery in the Apalachicola Bay, Florida Governor Rick Scott identified only "drought conditions for several years" and "overharvesting of illegal and sub-legal oysters" as "factors [that] ... led to the recent decline in oyster populations." Letter from Gov. Rick Scott to Ms. Rebecca Blank, Acting Secretary, U.S. Department of Commerce, at 2 (Sept. 6, 2012). Governor Scott did not claim that Georgia's allegedly inequitable water use was a cause of the decline in oyster populations in the Apalachicola Bay. By failing to claim in its letter to the Department of Commerce that the alleged decline in oyster populations in the Apalachicola Bay was caused by Georgia's allegedly inequitable water use, Florida has waived its ability to make that argument in this equitable apportionment action.

THIRD DEFENSE

Florida's claims are barred by the doctrine of unclean hands. Florida's own inequitable conduct in relation to the matter in controversy makes it unfair for Florida to obtain an equitable apportionment from Georgia:

(a) Florida's own inequitable conduct is responsible for some or all of the alleged decline in oyster populations in the Apalachicola Bay. Florida's inequitable conduct includes, but is not limited to, (i) permitting overharvesting of oysters in the Apalachicola Bay; (ii) permitting harvesting of illegal and sub-legal oysters in the Apalachicola Bay; (iii) failing to adopt an oyster lease system rather than maintaining an open-access fishery; (iv) failing to close an adequate portion of the bay to fishing as a

reserve stock; (v) failing to plant shells or requiring fisherman to re-shell oyster bars; and (vi) taking or consenting to actions and activities that increased the salinity in the Apalachicola Bay.

(b) Florida's own actions have destroyed, polluted, and reduced the habitats of certain wildlife, including sturgeon, mussel, and oyster species.

(c) The doctrine of unclean hands also prevents Florida from alleging that Georgia's agricultural water use is inequitable when Florida itself uses basin water for similar purposes. Florida alleges that Georgia's agricultural irrigation "cause streams and groundwater levels . . . to decline even further." Compl. ¶ 47. But Florida's own agricultural water use has grown significantly in the recent past. For example, in Jackson County, Florida—which is located almost entirely within the ACF Basin—the total number of irrigated acres nearly doubled between 2002 and 2007.

(d) Florida has failed to adopt reasonable conservation measures to protect and preserve water in the Apalachicola River and Bay. Florida cannot receive an equitable apportionment when it has failed to adopt reasonable conservation measures that could alleviate or mitigate the alleged harm.

FOURTH DEFENSE

Florida has failed to take steps to mitigate the harm and injury that it alleges in its Complaint. This failure to mitigate includes, but it is not limited to, Florida's failure to manage the Apalachicola Bay oyster fishery effectively, failure to implement sufficient water conservation programs in the ACF basin, failure to reduce waste, and failure to

undertake sufficient preservation activities to preserve the ecology and physical ecosystem of the Apalachicola Region.

FIFTH DEFENSE

Florida's claims are barred because any injury to Florida is attributable to an intervening and superseding cause. The Apalachicola River begins at the Woodruff Dam, and Florida complains that annual average flows calculated immediately below the Woodruff Dam have been at historic lows. Compl. ¶ 55. But Georgia has no control over the release of water from the Woodruff Dam; the complained flow rate is controlled exclusively by the United States Army Corps of Engineers. The Corps regulates the release flow from Woodruff Dam according to the ACF Master Water Control Manual, which is currently under revision with final approval planned for March 2017. Indeed, in prior litigation Florida claimed that "the Corps' actions in reducing releases for hydro[electric] power generation and navigation support have caused injury to . . . Florida, ***and compliance by the Corps*** with the laws at issue [in the MDL] ***will address those injuries.***"[1] The Corps' control of the Woodruff Dam is thus an intervening and superseding cause of any injury to Florida. That, in turn, means that Florida cannot attribute its alleged harm to conduct by Georgia and thus is not entitled to an equitable apportionment.

---

[1] State of Alabama's and State of Florida's Joint Motion and Memorandum in Support of Joint Motions for Partial Judgment on all Phase I Claims, *In re Tri-State Water Rights Litig.*, No. 3:07-md-00001-PAM-JRK, ECF No. 191, at 10 (M.D. Fla.) (filed Jan. 23, 2009) (emphasis added).

Respectfully submitted,

SAMUEL S. OLENS
ATTORNEY GENERAL
STATE OF GEORGIA
DEPARTMENT OF LAW
40 Capitol Square
Atlanta, GA 30334
Tel.: (404) 656-3383
AGOlens@law.ga.gov

CRAIG S. PRIMIS, P.C.
Counsel of Record
SARAH HAWKINS WARREN
K. WINN ALLEN
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel.: (202) 879-5000
craig.primis@kirkland.com

Special Assistant Attorneys General for the State of Georgia